

82-918

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

Office - Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS,
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COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

ANDRE LOVETTE, AND SIMONA LOVETTE,
Representative of the Estate of
Andre Lovette, Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

ERIC B. HENSON
Deputy District Attorney
Law Division
(Counsel of Record)
MARK S. GUREVITZ
Assistant District Attorney
GAELE McLAUGHLIN BARTHOLD
Assistant Chief
Appeals Division
EDWARD G. RENDELL
District Attorney
Philadelphia County

1300 Chestnut St.
Phila., Pa. 19107
(215) 875-6010

QUESTIONS PRESENTED

1. Whether the Fourth and Fourteenth Amendments prohibit the brief and limited movement of individuals reasonably suspected of criminal activity, absent probable cause to arrest?

2. Whether it is constitutionally permissible and reasonable for police to transport an individual properly detained under Terry v. Ohio, 392 U.S. 1 (1968), a short distance for a valid and reasonable investigative purpose?

3. Whether a Writ of Certiorari should be issued to resolve these questions on which conflicting decisions have been rendered by the Circuit Courts of Appeals and by the highest state courts of the nation?

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on October 5, 1982.

OPINIONS BELOW

The Opinion below and Judgment of the Pennsylvania Supreme Court, which is unofficially reported at 450 A.2d 975 (Pa. 1981),

but which has not yet been officially reported, is set forth in full in Appendix A, infra at 1A-15A. The Opinion below of the Pennsylvania Superior Court, which is officially reported at 271 Pa. Superior Ct. 250 (1979), and unofficially reported at 413 A.2d 390 (Pa. Superior 1979), is set forth in full in Appendix B, infra at 1B-12B.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on October 5, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).¹

¹Because an actual case and controversy is here presented, Richardson v. Ramirez, 418 U.S. 24, 37, 94 S. Ct. 2655, 2662 (1974) (Court limited by Article III "to adjudication of actual disputes between adverse parties"), this Court's jurisdiction is not defeated by respondent Andre Lovette's death shortly after the Pennsylvania Supreme Court granted discretionary review of his case.

(Footnote 1 continued on next page.)

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When petitioner, the Commonwealth of Pennsylvania, learned of Mr. Lovette's death two years later, shortly after oral argument of the case, it immediately petitioned to abate the appeal. Respondent's counsel and respondent's mother, as representative of his estate, opposed the petition, however, and respondent's mother petitioned to be substituted for her deceased son "as a party before [the Pennsylvania Supreme] Court." See Pa.R.A.P. 502(a). Thereafter, the Pennsylvania Supreme Court denied the Commonwealth's petition. See Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741 (1972) ("... it is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process."). The interests of the Estate and of the Commonwealth are therefore affected by the judgment of the Pennsylvania Supreme Court.

While the question of mootness is a federal one, Liner v. Jafco, Inc., 375 U.S. 301, 304, 84 S. Ct. 391, 393 (1964), a continuing controversy, between adverse parties, leading to a judgment determining the parties' legal interests, was resolved in the state court system and is now before this Court. This is the essence of a live controversy.

(Footnote 1 continued on next page.)

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In this instance, unlike Dove v. United States, 423 U.S. 325, 96 S. Ct. 579 (1976), where the death of the petitioner during the pendency of a petition for certiorari resulted in its dismissal, there is no changed circumstance which defeats this Court's review. In Dove there was no showing that either party had an interest which continued beyond defendant's death. Here, respondent Andre Lovette's mother and personal representative willingly chose to substitute for her son, so as to protect his estate and insure that the validity of his conviction was justiciable. Respondents, therefore, may not defeat this Court's jurisdiction and cut off further appellate review, in derogation of public and state interests, simply because they achieved a "favorable" result in the Pennsylvania Supreme Court.

**CONSTITUTIONAL PROVISIONS
INVOLVED**

United States Constitution, Amendment Four, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 15, 1976 at 5:15 p.m., Philadelphia Police Officer James McCoy was dispatched to investigate an anonymous report of men inside a deserted house with stolen property. At the vacant building, Officer McCoy and his partner discovered stereo equipment, wrapped Christmas gifts, clothing, pottery, and other items. Further investigation revealed that a nearby house had been burglarized and that the burglars took the stolen items to the deserted premises leaving trails of footprints in a muddy plot of ground which separated the buildings (N.T. 4-7).²

Ten minutes after the officers' arrival, the owner of the burglarized premises returned. He told police that when he left his home at approximately

²N.T. refers to the Trial Notes of Testimony.

10:30 a.m., the property was secured. The owner identified the property in the abandoned building as his (N.T. 8-9).

Within twenty minutes of the radio call Officer McCoy began to patrol the immediate area. A minute later and a block and a half away he spotted three men; they attracted his attention because each had mud on his shoes. Respondent, Andre Lovette, a member of the trio, had a paper bag in his hand (N.T. 9-11).

When stopped by Officer McCoy, none of the men was able to produce any identification (N.T. 10-11, 19). Neither could they initially explain the source of the mud on their shoes, although they later said they must have walked through a field at some time during the day. Officer McCoy next asked Lovette what was in the paper bag. He responded by showing the officer a camel-colored hat which he

claimed was just obtained from an unspecified friend (N.T. 12-13).

Based on the trio's muddy shoes and evasive answers, Officer McCoy transported them to the burglary scene, one and one-half blocks away, for possible identification of the hat by the victim. Before placing the men in the police vehicle, the officer conducted a "pat down" search; this revealed a gold ring and a silver dime of numismatic value. At the burglarized house, less than a minute later, the complainant identified the hat, ring and silver dime as items taken from his house. The three men were then placed under arrest and Lovette was charged, in the Court of Common Pleas of Philadelphia County, with burglary and theft by unlawful taking (N.T. 13-16).

After the denial of a pre-trial suppression motion, which alleged that

physical evidence was obtained in violation of Lovette's constitutional rights and the product of an arrest based on less than probable cause, respondent waived trial by jury and was convicted as charged. The trial court denied post-verdict motions and imposed a sentence of four to twenty-three months imprisonment. The conviction was affirmed by the Pennsylvania Superior Court sitting en banc. Commonwealth v. Lovette, 271 Pa. Superior Ct. 250, 413 A.2d 390 (1979) (Appendix B, infra at 1B-12B). Following the grant of a petition for allowance of appeal, the Supreme Court of Pennsylvania reversed the conviction in an opinion issued on October 5, 1982 (Appendix A, infra at 1A-15A). The Commonwealth of Pennsylvania now seeks this Court's review of that decision.

REASONS FOR GRANTING THE WRIT

THE FOURTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT THE BRIEF AND LIMITED MOVEMENT OF A LAWFULLY DETAINED SUSPECT BE SUPPORTED BY PROBABLE CAUSE TO ARREST. NO CONSTITUTIONAL VIOLATION OCCURS IF A PERSON VALIDLY STOPPED AND DETAINED UNDER TERRY V. OHIO, 392 U.S. 1 (1968), IS MOVED A SHORT DISTANCE FOR A VALID AND REASONABLE INVESTIGATIVE PURPOSE.

The question presented here is whether police constitutionally may transport a suspect properly detained under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), a short distance so that the known victim of a recent burglary may determine promptly whether property found on the suspect was stolen in the burglary.

In this case, a Philadelphia police officer who knew that the perpetrators of a recent burglary had trekked through mud with the stolen goods, stopped three men on a city sidewalk a short distance away

because the shoes of all three were covered with mud. When the trio gave evasive answers about the mud and were unable to produce identification, this officer prepared to transport them to the victim to determine if he could identify a hat which respondent carried in a bag and said was given to him by an unspecified friend. A frisk then revealed a gold ring and a dime of numismatic value in the pocket of one of respondent's companions. The officer then transported the trio one and one-half blocks to the burglary site to see if the victim could identify the hat, ring and dime. When the victim positively identified all three items as his, the three men were arrested.

The Pennsylvania Supreme Court, on these facts, held that "the added element of a transportation of the suspects from the place of the initial encounter without exigent circumstances to support that

action" constituted an arrest requiring probable cause, despite the legitimate investigative purpose of the transportation. Appendix A at 12A-13A.³ Relying on this Court's Fourth Amendment decisions, the Pennsylvania Supreme Court concluded that movement of suspects was not encompassed in the exception to the requirement of probable cause enunciated by this Court in Terry v. Ohio, supra, and its progeny. Appendix A at 9A-11A.

³The Pennsylvania Supreme Court acknowledged the reasonableness of the stop and the further detention for identification:

The police had the option of detaining the suspects at the site of the initial encounter and either bringing the complainant to the site for his identification of the questioned articles or taking those items to him. Either situation would present a much stronger case for the position the Commonwealth presently urges.

Appendix A at 12A.

The mere fact that an individual who is reasonably suspected of criminal behavior has been moved a short distance, for a valid investigative purpose, is not determinative of whether the Fourth and Fourteenth Amendments have been violated. Rather, the question, as in any Fourth Amendment case, is whether the length and intrusiveness of the investigation was reasonable.

Where, as here, detention of an individual for identification is proper, his brief transportation to a nearby known victim is not an unreasonably greater intrusion or violative of his constitutional rights. Transport does not unduly or unreasonably delay the decision to release or arrest the suspect. Indeed, it may take longer to have witnesses brought to the site of the stop. This would defeat many prompt releases and

prevent police from expeditiously resuming their investigations when criminals are most likely to be apprehended.

Contrary to the Pennsylvania Supreme Court's conclusion, the brief detention and transportation here of the unidentified individuals suspected of a nearby, recent burglary was reasonable.⁴ The time spent in transporting respondent was less than a minute. Less than a half hour elapsed between Lovette's initial contact with police and his arrest. This delay

⁴The Pennsylvania Supreme Court's reliance on Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979), to support its conclusion that movement of a suspect necessarily constitutes an arrest for which probable cause must be present, is obviously misplaced. In Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587 (1981), this Court expressly stated that Dunaway applies only to detentions designed to provide an opportunity for custodial interrogation. 452 U.S. at 702 n.15, 101 S. Ct. at 2593 n.15.

was no greater than that contemplated by Terry.⁵ As Professor LaFave has noted, a stop remains reasonable in length so long as "... the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and ... it is rather essential to the investigation that the suspect's presence be continued during that interval." 3 W. LaFave, Search and Seizure §9.21, at 40, quoted in Michigan v. Summers, supra, 452 U.S. at 701-02 n.14, 101 S. Ct. at 2593 n.14.

⁵The ALI Code suggests that any detention of under twenty minutes is per se reasonable in duration. See ALI Model Code of Pre-Arrest Procedure §110.2 Commentary, at 283 (Proposed Official Draft 1975). This Court, however, has recently said that the investigative purpose of Terry is best served in some circumstances if police are able to detain for longer than the brief period involved in the Terry case. Michigan v. Summers, supra, 452 U.S. at 700 n.12, 101 S. Ct. at 2593 n.12.

The vast majority of the federal courts of appeal and state courts that have considered this issue have held that the brief transportation of suspects a short distance for identification is reasonable during an investigative detention premised on reasonable suspicion.⁶ Two

⁶See, e.g., United States v. White, 648 F.2d 29, 37 (D.C. Cir.), cert. denied, 454 U.S. 924, 102 S. Ct. 424 (1981) ("courts have routinely allowed officers to insist on reasonable changes of location when carrying out a Terry stop"); United States v. Short, 570 F.2d 1051 (D.C. Cir. 1978) (police may, pursuant to Terry stop, take defendant to nearby burglary scene); United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), cert. denied, 435 U.S. 944, 98 S. Ct. 1527 (1978) (officer could bring defendant back into bank for Terry investigation where suspect had no identification); United States v. Oates, 560 F.2d 45 (2d Cir. 1977) (removal into nearby office); United States v. Thevis, 469 F. Supp. 490 (D. Conn.), aff'd, 614 F.2d 1293 (2d Cir. 1979), cert. denied, 446 U.S. 908, 100 S. Ct. 1834 (1980) (having defendant accompany police officer into bank manager's office did not transform investigative stop into full arrest); State v. Watson, 165 Conn. 577, 345 A.2d

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federal circuit courts of appeals have held, however, that requiring an individual to

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532 (1973) (where during Terry stop credit cards and watches are observed on floor of vehicle, transport of all four occupants to police station was not an arrest); Wilkinson v. United States, 427 A.2d 923 (D.C. App.), cert. denied, 454 U.S. 852, 102 S. Ct. 295 (1981) (transporting suspect to crime scene one-half block away after suspicious answers held to be investigatory detention); District of Columbia v. M.M., 407 A.2d 698 (D.C. App. 1979) (during valid investigatory stop, proper to transport suspects to scene as well as frisk them for weapons and look in bag one carried prior to placing pair in police cruiser); Singleton v. United States, 383 A.2d 1064 (D.C. App. 1978) (same; placed in police car and returned to robbery scene one block away); People v. Hines, 94 Ill.App.3d 1041, 419 N.E.2d 420 (1981) (where police could temporarily detain suspect for investigation, it was reasonable to transport him one-half block back to scene to see whether he was involved); People v. Herron, 89 Ill. App.3d 1048, 412 N.E.2d 1365 (1980), cert. denied, 454 U.S. 1080, 102 S. Ct. 633 (1981) (brief transportation of defendants to proximate crime scene for identification by known eyewitness proper); People v. Holdman, 73 Ill.2d 213, 383 N.E.2d 155 (1978), cert. denied, 440 U.S. 938, 99 S. Ct. 1285 (1979) (return of passengers

(Footnote 6 continued on next page.)

go against his will from an airport concourse to an office for further interrogation constitutes a seizure equivalent

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fleeing car proper under Terry); People v. Brnja, 70 App.Div.2d 17, 419 N.Y.S.2d 591 (1979), aff'd on other grounds, 50 N.Y.2d 366, 429 N.Y.S.2d 173, 406 N.E.2d 1066 (1980) (defendant stopped, frisked, handcuffed, put in car and driven one-half mile to store for identification by owner fifteen minutes to one-half hour after robbery; held reasonable without probable cause); State v. Gardner, 28 Wash. App. 721, 626 P.2d 56 (1981) (where police had report of two males in woods, reasonable to stop two males at roadside next to woods and return them to abandoned vehicle less than a mile away; held not an arrest but an investigative stop); State v. Isham, 70 Wis.2d 718, 235 N.W.2d 506 (1975) (reasonable under Terry to transport suspect two and one-half blocks for voice identification by victim). See also United States v. Post, 607 F.2d 847 (9th Cir. 1979) (if an officer is justified in stopping a person for questioning, the stop does not become an arrest if, in the absence of protest or "coercive" circumstances, the officer directs that the questioning occur in a less public place); United States v. Salter, 521 F.2d 1326 (2d Cir. 1975).

to an arrest that must be justified by probable cause.⁷ California permits movement of the suspect to the crime for identification purposes only where exigent circumstances exist.⁸ Review by this Court is crucial to resolve these conflicts and to provide guidance to police.

When, as here, Terry v. Ohio, supra, permits police to detain a suspect for an

⁷ United States v. Berry, 670 F.2d 583, 802 (5th Cir. 1982); United States v. Hill, 626 F.2d 429, 433-37 (5th Cir. 1980); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977).

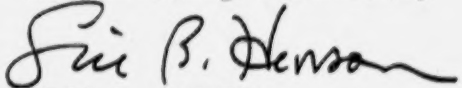
⁸ See People v. Harris, 15 Cal.3d 384, 124 Cal. Rptr. 536, 540 P.2d 632 (1975), cert. denied, 425 U.S. 934, 96 S. Ct. 1664 (1976) (transport of suspect to crime scene for possible identification proper only where victim incapacitated, suspect consents, or there are other unusual circumstances which the court did not specify); In re Lynette G., 54 Cal.App.3d 1087, 126 Cal. Rptr. 898 (1976) (transport of defendant to injured victim proper under Harris); People v. Hidalgo, 78 Cal.App.3d 675, 144 Cal. Rptr. 515 (1978) (transport unreasonable under Harris guidelines).

identification, a one minute ride to the crime scene does not convert an otherwise reasonable stop into an arrest without probable cause.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Eric B. Henson", with a long, sweeping horizontal stroke at the end.

ERIC B. HENSON

Deputy District Attorney

Law Division

(Counsel of Record)

MARK S. GUREVITZ

Assistant District

Attorney

GAELE McLAUGHLIN BARTHOLD

Assistant Chief

Appeals Division

EDWARD G. RENDELL

District Attorney

Philadelphia County

1300 Chestnut St.
Phila., Pa. 19107
(215) 876-6010